



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

*Becker*  
**AUDIT REFERRAL # 03-05**

May 5, 2003

**MEMORANDUM**

TO: Lawrence H. Norton  
General Counsel

THROUGH: James A. Pehrkon  
Staff Director

Robert J. Costa  
Deputy Staff Director

FROM: Joseph F. Stoltz  
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Audit Division

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2003 MAY -6 A 9:50

SUBJECT: Friends of Weiner (A01-08) – Referral Matters

On April 22, 2003, the Commission approved the final audit report on Friends of Weiner. The final audit report includes findings that meet the criteria for referral to your office for possible compliance action (see attachments).

All workpapers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Jim Miller or Ray Lisi at 694-1200.

**Attachments:**

- FAR Finding II.A. (Receipt of Contributions from Individuals in Excess of the Limitations)
- FAR Finding II.B. (Receipt of Loan in Excess of the Limitations)
- FAR Finding II.D. (Contributions Subject to 48 Hour Notification)

**AUDIT FINDINGS AND RECOMMENDATIONS****A. RECEIPT OF CONTRIBUTIONS FROM INDIVIDUALS IN EXCESS OF THE LIMITATIONS**

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office, which in the aggregate, exceed \$1,000. Subsection (b) (2) and (6) of 11 CFR §110.1 explains that *with respect to any election* means that if the contribution is not designated in writing by the contributor for a particular election then the contribution applies to the next election for that Federal office after the contribution is made. A contribution is considered made when the contributor relinquishes control over the contribution by delivering the contribution to the Candidate, the political committee, or an agent of the committee. A contribution that is mailed is considered to be made on the date of the postmark.

Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that the treasurer shall be responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the contribution limitations of 11 CFR 110.1. If any such contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with 11 CFR 110.1(b) or 110.1(k), as appropriate. If a redesignation or reattribution is not obtained, the treasurer shall, within sixty days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 103.3(b)(4) of Title 11 of the Code of Federal Regulations states that any contribution which appears to be illegal under 11 CFR §103.3(b)(3), and which is deposited into a campaign depository shall not be used for any disbursements by the political committee until the contribution has been determined to be legal. The political committee must either establish a separate account in a campaign depository for such contributions or maintain sufficient funds to make all such refunds.

Section 110.1(k) of Title 11 of the Code of Federal Regulations states that any contribution made by more than one person, except for a contribution made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing and if a contribution made by more than one person does not indicate the amount to be attributed to each contributor, the contribution shall be attributed equally to each contributor. If a contribution to a candidate or political committee, either on its face or when aggregated with other contributions from the same contributor, exceeds the limitations on contributions set forth in 11 CFR 110.1(b), (c) or (d), as appropriate, the treasurer of the recipient political committee may ask the contributor whether the contribution was intended to be a joint contribution by more than one person. A contribution shall be considered to be reattributed to another contributor if the treasurer of the recipient political

committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution, and within sixty days from the date of the treasurer's receipt of the contribution, the contributors provide the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

Section 110.1(b)(5) of Title 11 of the Code of Federal Regulations states, in relevant part, that the treasurer of an authorized political committee may request a written redesignation of a contribution by the contributor for a different election if the contribution exceeds the limitation on contributions set forth in 11 CFR 110.1(b)(1). A contribution shall be considered to be redesignated for another election if the treasurer of the recipient authorized political committee requests that the contributor provide a written redesignation of the contribution and informs the contributor that the contributor may request the refund of the contribution as an alternative to providing a written redesignation and within sixty days from the date of the treasurer's receipt of the contribution, the contributor provides the treasurer with a written redesignation of the contribution for another election, which is signed by the contributor.

Section 110.1(l)(5) of Title 11 of the Code of Federal Regulations states, in part, that if a political committee does not retain the written records concerning redesignation or reattribution, the redesignation or reattribution shall not be effective, and the original designation or attribution shall control.

FOW's contribution records consisted of a database containing contributor information and bank deposit slips that included copies of contribution checks. A sample review of contributions from individuals disclosed that FOW's had received excessive contributions. The review of all contributions from individuals who made contributions in excess of \$1,000 revealed the following:

1. PRIMARY ELECTION CONTRIBUTIONS

FOW received contributions from 175 individuals, totaling \$202,801, in excess of the contribution limitation for the primary election. These contributions were dated prior to the primary election and were either designated to the general election or reattributed to another individual by FOW, without proper written authorization from the contributors. FOW did receive redesignation letters from 19 of these contributors, but none of the redesignations were timely. The Audit staff noted that most of the redesignation letters were signed and dated more than a year after the contributions were made well beyond the period provided in the regulations and therefore the contributions must be refunded. FOW made contribution refunds, totaling \$2,501, to four contributors, but made them untimely. Taking into consideration these untimely refunds, the Audit staff determined that FOW has unresolved excessive contributions totaling \$200,300.

## 2. General Election Contributions

FOW received contributions from 8 individuals that exceed the contribution limitation for the general election by \$10,000. In some cases FOW attributed portions of these contributions to another individual without written authorization. FOW made contribution refunds, totaling \$3,000, to two individuals; however, these refunds were not timely. Taking into consideration these untimely refunds, FOW has unresolved excessive contributions of \$7,000.

FOW did not maintain a separate account to deposit questionable contributions but did consistently maintain sufficient balances to cover the amounts deposited in excess of the limitations.<sup>1</sup> The Audit staff also performed an analysis of the contributions and disbursements to determine whether any of the contributions designated for the general election had been spent on primary election expenses. The analysis was performed using election designations for contributions as entered by FOW on its database. The analysis shows that contributions designated by FOW for the general election were not spent on primary related activity.

At the exit conference, FOW officials were provided schedules detailing the Primary and General excessive contributions discussed above. FOW officials stated they would look into this matter.

Subsequent to the exit conference, FOW provided copies of refund checks (front only) issued in November 2001 to seven individuals, totaling \$9,250. To date, copies of negotiated refund checks have not been provided. Absent evidence that the refund checks were cashed, the Audit staff determined that \$207,300 (\$200,300 + \$7,000) was the amount of unresolved excessive contributions received for the Primary and General elections.

However, the Commission has recently adopted new regulations that allow committees greater latitude to either reattribute contributions to joint account holders or redesignate contributions to other elections, and the Commission has applied these new provisions to current matters. Accordingly, the Audit staff reevaluated this issue under the revised regulations. The reevaluation resulted in a reduction of the number of unresolved excessive contributions to \$27,250 for the Primary election and \$6,000 for the General election<sup>2</sup>.

In the interim audit report, it was recommended that FOW provide evidence demonstrating that the contributions in question are not excessive and that the refunds it made were timely. Absent such a demonstration, it was recommended that FOW refund \$33,250<sup>3</sup>

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<sup>1</sup> On its latest disclosure report covering the period through November 25, 2002, FOW reported ending cash on hand totaling \$1,203,696.

<sup>2</sup> FOW did not report any Primary debt, therefore no excessive General election contribution could be redesignated for the Primary election.

<sup>3</sup> This total is net of refunds that cleared FOW bank accounts.

and provide evidence of such refunds (photocopies of the front and back of the negotiated refund checks) for our review.

In response to the interim audit report, FOW provided photocopies of refund checks for the \$33,250 in excessive contribution (front only). The refund checks were issued on February 26, 2003, and March 27, 2003.

#### **B. RECEIPT OF LOAN IN EXCESS OF THE LIMITATIONS**

Section 110.10 of Title 11 of the Code of Federal Regulations states, in part, that candidates for Federal office may make unlimited expenditures from personal funds. For the purposes of this section *personal funds* means - any assets which, under applicable state law, at the time he or she becomes a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either legal and rightful title, or an equitable interest. Further personal funds means - salary and other earned income from bona fide employment; dividends and proceeds from the sale of the candidate's stocks or other investments; bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy; proceeds from lotteries and similar legal games of chance.

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000.

Section 100.7(a)(1)(i) of Title 11 of the Code of Federal Regulations states, in part, that the term *contribution* includes the following payments, services or other things of value: a gift, subscription, loan (except for a loan made in accordance with 11 CFR 100.7(b)(11)), advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office is a contribution. The term *loan* includes a guarantee, endorsement, and any other form of security. A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid. The aggregate amount loaned to a candidate or committee by a contributor, when added to other contributions from that individual to that candidate or committee, shall not exceed the contribution limitations set forth at 11 CFR part 110. A loan, to the extent it is repaid, is no longer a contribution.

In September 1998 the Candidate made two loans to FOW totaling \$28,000. FOW paid \$10,000 on the loans in 1998 and repaid the remainder of the loans in 1999 during the period covered by this audit. The Audit staff requested that FOW produce loan documents, copies of the loan proceed checks, and copies of the Candidate's bank statements for the period August through October 1998 in order to determine whether the loans were made from the personal funds of the Candidate.

Initially, Counsel for FOW responded that no loan documents exist and also refused to produce the bank statements on the grounds that the 1998 loan falls outside of the scope of the 2000 election cycle audit and the request for the documents violates the Candidate's First Amendment rights and privacy interests.

On May 17, 2002, the Commission issued a subpoena to FOW requesting production of the documents and a subpoena and order to the Candidate to produce records and to identify the source of the funds used to make the loan. On May 13, 2002, prior to issuance of the subpoenas, counsel for FOW produced monthly statements for the Candidate's credit union account for September and October 1998 and a tissue copy of one of the loan proceed checks for \$20,000 payable to FOW. In a letter accompanying the production, the counsel for FOW stated that the Candidate has no other bank accounts; does not have a copy of the other loan proceeds check and no other documents. Counsel for FOW explained that the Candidate did not have a copy of the monthly statement for August 1998 and that, due to a computer problem the credit union was unable to retrieve it from its records. A letter from a credit union officer confirming this was included.

A review of the Candidate's credit union statement for September 1998, shows that on September 2, 1998, just prior to making the loans to FOW, the Candidate deposited \$5,000 into the credit union account bringing the balance to \$32,222. By September 10, 1998, the Candidate had transferred \$28,000 of this amount to FOW. For the months of September and October the only other significant deposits to the Candidate's account appear to be direct deposits of salary. The activity in the Candidate's account raised questions as to the source of the \$28,000 in loans.

On June 25, 2002, Counsel for FOW stated that FOW had produced all documents in its possession responsive to its subpoena. Counsel for FOW further stated that the Candidate had not received his subpoena and that Counsel did not have the authority to receive the subpoena on his behalf. Another copy of the subpoena was sent to the Candidate on July 2, 2002.

On August 5, 2002, in response to the subpoena, the Candidate stated: "The funds I used to make loans to Friends of Weiner, totaling \$28,000, in September 1998 were funds in my personal bank account at the Municipal Credit Union... (the "MCU Account"). Pursuant to the FEC's requests, I previously produced my bank statements for the MCU Account for September and October 1998." The Candidate also stated: "to the best of my current ability to recall, I believe that in August of 1998, I made the following deposits into the MCU Account:

- a. Two deposits of \$1,734.75 from the City of New York;
- b. A deposit of \$10,000.00 from Mort Weiner, my father;
- c. A deposit of \$2,500.00 from Fran Weiner, my mother."

The Candidate further stated that he is unable to locate a statement for the credit union account for August 1998 and the credit union is unable to provide a copy.

On August 6, 2002, the Commission issued an additional subpoena to the Candidate's credit union requesting documents sufficient to identify all items in excess of \$2,000 deposited into the Candidate's account for the period July through August 1998. In addition, the credit union was asked to provide documentation to identify the source of the \$5,000 deposit into the Candidate's account on September 2, 1998.

On September 16, 2002, in response to the subpoena, the credit union provided four check copies (front & back), totaling \$30,000, that were deposited into the Candidate's account.<sup>4</sup> One check dated August 3, 1998, in the amount of \$15,000 was made payable to the Candidate and was drawn on an account of the Candidate's father. The memo line of the check indicated that the \$15,000 was a loan. Two of the checks made payable to the Candidate (\$5,000 & \$2,862) each dated August 5, 1998, were drawn on accounts of the Candidate's mother. The memo lines on these checks were blank. The last check dated August 3, 1998, in the amount of \$7,138 was drawn on an investment account and was made payable to the Candidate's mother.

Based on the facts presented above, it appears that the Candidate's parents provided the funding for the \$28,000 in loans to FOW. Since both parents previously contributed \$1,000 to FOW primary, it appears that the Candidate's parents made excessive contributions in the form of a loan to FOW totaling \$28,000. No information was available about whether the funds were returned to the Candidate's parents.

In the interim audit report, it was recommended that FOW provide documentation to show that the funds provided to the Candidate by his parents should not be considered excessive contributions to FOW. If amounts received from the Candidate's parents are "gifts of a personal nature which had been customarily received prior to candidacy", evidence of previous gifts of a similar nature should be provided. Further the candidate should provide the source of funds for the \$5,000 deposit into his credit union account on September 2, 1998. Finally the Candidate should provide an explanation of and documentation for the final disposition of the \$28,000 repaid to him from FOW. The documentation should include but not be limited to copies of deposit tickets and cancelled checks (front & back) showing the final disposition of the \$28,000.

In response to the interim audit report, counsel for FOW stated that "Based on information received from our client, we understand that the Candidate returned the amount in question to his parents." The response did not include any evidence that the funds provided by the Candidate's parents should not be treated as excessive contributions. In addition, the Candidate did not provide any information regarding the source of funds for the \$5,000 deposit into his credit union account on September 2, 1998, or documentation for the final disposition of the \$28,000 repaid to him from FOW.

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The credit union did not provide documents to identify the source of the \$5,000 deposit on September 2, 1998.

**D. CONTRIBUTIONS SUBJECT TO 48 HOUR NOTIFICATION**

Section 104.5(f) of Title 11 of the Code of Federal Regulations states, that if any contribution of \$1,000 or more is received by any authorized committee of a candidate after the 20<sup>th</sup> day, but more than 48 hours, before 12:01a.m. of the day of the election, the principal campaign committee of that candidate shall notify the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48 hours of receipt of the contribution. The notification shall be in writing and shall include the name of the candidate and office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution. The notification shall be in addition to the reporting of these contributions on the post-election report.

FOW was required to report within 48 hours of receipt, any contributions of \$1,000 or more received August 24, 2000, through September 9, 2000, for the primary election and October 19, 2000, through November 4, 2000, for the general election. It was determined that most of the checks dated during these periods were included in deposits made after the periods<sup>5</sup>. FOW used the check date as the reported date on its Schedules A for these contributions. No record was kept of the date the contributions were received. Therefore, three days were allowed for delivery of the contribution after the date of the check when determining the date of receipt. Using this criteria, the review identified 42 contributions totaling \$63,500 that appeared to have been received within two and twenty days of the primary election, held on September 12, 2000, and 6 contributions totaling \$9,500 that appeared to have been received within two and twenty days of the general election, held on November 7, 2000.

Forty-eight hour notices were not filed for 43 of the contributions noted above totaling \$66,000. Forty of the contributions totaling \$61,500 related to the primary election, while three contributions totaling \$4,500 related to the general election.

At the exit conference, FOW officials were informed of these discrepancies and were provided schedules detailing the contributions noted above. FOW officials stated they would look into the matter.

In the interim audit report, it was recommended that FOW submit evidence that all required 48 hour notices were filed as required or submit evidence that the noted contributions were not received within two and twenty days of the primary or general election.

In response to the interim audit report, Counsel for FOW questioned the receipt date the Audit staff used in determining whether contributions were received within the 48-hour reporting period. Counsel for FOW contends that the Audit staff's arbitrary use of the three-day period from the day each contribution was dated ignores the Commission's regulations at 11 CFR §102.8(a) permitting a person who receives a contribution for an authorized committee 10 days to forward the contribution to the Treasurer. Counsel for FOW

<sup>5</sup> FOW made deposits infrequently making the deposit date an unreliable indication of receipt date.



also stated that on September 11, 2000, FOW held a gala fundraising event, which was after the close of the 48-hour reporting period and that most of the contributors listed on the schedules provided by the Audit staff attended and/or contributed to this event. In addition, counsel for FOW stated the Audit staff had not permitted a reasonable time frame for agents of the campaign who served as hosts for the event, to collect, receive and forward contributions for the event to FOW.

The Audit staff agrees that the regulations provide 10 days for persons who receive a contribution for a committee to forward that contribution to the Treasurer. However, FOW's response provides no evidence that an agent initially received the contributions in question. Eleven of the contributions, totaling \$16,000, are associated with solicitation response devices that reference an unidentified reception and include a Washington, D.C. address. The Audit staff was able to determine that the address is that of a fundraising concern. Therefore, although it is not possible to determine if the event is the September 11, 2000, event referred to by the counsel for FOW, or the precise date of FOW's receipt of the contributions, it is reasonable to assume that the fundraiser initially received these contributions and to allow the additional 10 days for transmittal to FOW. With one exception, documentation for the remaining contributions does not associate them with any event or any person who may have received them on behalf of FOW. The exception is a contribution that was accompanied by a letter that references the September 11, 2000, event, but the letter is addressed to FOW's New York post office box rather than some other person. Therefore, the remaining contributions that lack a 48-hour notice total \$50,000.

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